to appoint the plaintiff as its Licensee and Retailer.

Whilst it is true that the defendant went along with the plaintiff by providing its support to the plaintiff, there is still the underlying agreement that their business relationship was to be governed by the terms and conditions of the 2 agreements to be executed with the mutual consent of both parties. This was not the case here and if indeed the plaintiff was led to believe that an oral or *de facto* agreement existed between them, that agreement has already lapsed as under the terms of the defendant's letter of offer dated 15 May 1992, the plaintiff's appointments were only for a term of one year, terminable by the giving of 3 months written notice. Thus the agreement has expired by affluxion of time, on 15 May 1993, and by its solicitors' letter dated 11 January 1993, the defendant had given the 3 months written notice. In any event, as at 11 January 1993, when the interim injunction was obtained, I consider that there was no concluded contract reached between the parties.

The interim injunction is couched in terms that are mandatory in nature and the plaintiff must establish a very strong case to maintain the injunction. In this case, I consider that no strong case has been made out by the plaintiff as there is no concluded contract to be enforced. Even if a *de facto* agreement had existed between the parties, this agreement has since expired by affluxion of time and by a notice of termination validly given.

If indeed the plaintiff had suffered damages by its preparatory acts to get the music school going, such damages are easily identifiable and hence damages would be an adequate remedy.

From my finding that no concluded agreement had been reached between the parties, I had allowed with costs the defendant's application to have the interim injunction obtained on 11 January 1993, set aside.

The plaintiff then applied orally for an *Erinford* injunction to maintain the *status quo.* As I have already concluded that there was no concluded agreement between the parties, there is therefore no *status quo* to maintain and in any event, the granting of an *Erinford* injunction defeats the whole purpose of my dissolving the interim injunction in the first place. For that reason I dismissed the plaintiff's oral application for an *Erinford* injunction pending appeal.

UNION UAP INSURANCE

v.

FADARA YACHT SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-940-92]
3 NOVEMBER 1993

INJUNCTION: Plaintiff obtaining ex parte injunction against defendant - Defendant applying to set aside injunction after a lapse of a year - Whether defendant's application should be allowed - Whether injunction should be set aside.

PRACTICE & PROCEDURE: Plaintiff a foreign company - Defendant applying for security for costs - Whether Court ought to order security for costs - Whether defendant's application for deposit of RM250,000 as security for costs excessive.

The plaintiff was granted an order in terms of their application to, *inter alia*, restrain the defendant from delivering, selling or transferring a boat to any other person until after the trial of the action or until further order.

Just over a year later the defendant applied to set aside the writ of summons or in the alternative the interlocutory injunction and also applied for an order that the plaintiff deposit the sum of RM250,000 as security for costs in the matter.

Held:

[1] The plaintiff has a cause of action in the matter and there are serious questions to be tried. The balance of convenience was in favour of the continuation of the injunction since the boat had been tendered as security for the relevant loan and the dissolution of the injunction would ultimately mean the loss of this security.

[2] It has been a matter of practice that a plaintiff out of the jurisdiction should give security for costs. However the sum of RM250,000 sought by the defendant was excessive and in the circumstances a sum of RM30,000 was more appropriate, the said sum to be deposited within three weeks of the said order.

[Defendant's application to set aside the writ of summons or alternatively, the injunction, dismissed with costs. Plaintiff ordered to deposit the sum of RM30,000 as security for costs].

Cases referred to:

RCA Sdn. Bhd. v. Pekerja-pekerja RCA Sdn. Bhd. & Ors. [1991] 1 MLJ 309 ***(refd)***

American Cynamid Co. Ethicon Ltd. [1975] AC 396 ***(refd)***

J.H. Rayner (Mincing Lane) Ltd. & Ors. v. Manilai & Sons (M) Sdn. Bhd. & Anor. [1988] 2 CLJ 620 / [1987] 1 MLJ 312 ***(refd)***

New Malaya Co. Ltd. v. Abu Bakar [1961] 27 MLJ 151 ***(refd)***

For the plaintiff-Rajendra Navaratnam; M/s Azman Davidson & Co.

For the defendant-Andrew Ng; M/s Yeo & Yeo

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

On 7 July 1992, the plaintiff was granted the order in terms of their *exparte* application filed upon a certificate of urgency the previous day to restrain the defendant, their agent, servant or whosoever acting on their behalf from delivering, selling, transferring, or doing any act amounting to the same, a boat known as "My Sundeck" of Fadara 55 make, to any other person, particularly Tiziana Limited or Philippe Moret until after the trial of the action or until further order with costs in the cause.

Just over a year later, on 15 July 1993 to be exact, the defendant had filed a summons in chambers upon a certificate of urgency applying to set aside the writ of summons dated 6 July 1992 or in the alternative to set aside the interlocutory injunction dated 7 July 1992, damages, costs and other relief. On 7 August 1993, the defendant had applied for an order that the plaintiff deposit RM250,000 as security for costs in the matter.

In his submissions, learned Counsel for the defendant was of the view that there was no cause of action against the defendant as there were a number of parties involved in the transaction. He had stated that the plaintiff, an insurance company in Switzerland, had granted a loan to Philippe Moret and the security was a boat made by Aquarius Yachts from France. The project was transferred to Maxstyle Limited in Taiwan and the new maker was one Rudolph Pfaff who had instructed Tiger Marine in Taiwan to make the boat who in turn had made the order to the defendant in Malaysia. The boat had since been constructed but the plaintiff had obtained the injunction on 7 July 1992 to restrain the defendant from delivering it to the purchaser.

He had also quite rightly pointed out that the injunction obtained was in fact substantively the sole final relief claimed by the plaintiff in their statement of claim. He added that Rudolph Pfaff had no authority to represent the defendant and Tiger Marine had no interest in the defendant and that in fact, the defendant and Tiger Marine had contracted to construct the boat at a cost of US$280,000 and US$110,000 had been paid. As a result of the injunction, learned Counsel maintained, the defendant was not in a position to do anything and was in a highly prejudicial situation as the market for boats was bad and was worsening further. As they had been offered RM150,000 for the boat, the defendant's loss was mounting when in actual fact they had no dealings with the plaintiff, Philippe Moret or Rudolph Pfaff who had given the undertaking now denied by the defendant.

The contention of the plaintiff is best summed up by reproducing certain paragraphs of the last two affidavits of their General Managing Director Mr. Pierre Gautier on which learned Counsel for the plaintiff had based his arguments. As for the application to strike out the action or alternatively to set aside the injunction, Mr. Pierre Gautier had among other things averred on 11 August 1993 as follows:

> 5. Further to paragraph 4 above, I verily believe that the plaintiff has a valid cause of action and that the plaintiff's application for an interlocutory injunction was warranted and is to be perpetuated.
> 6. Firstly, the plaintiff's debtor, Philippe Moret/Tiziana Ltd./Turismo Motor Yacht, the purchaser of the yacht ("the ultimate purchaser") has acknowledged a debt against the plaintiff for a considerable sum of money (which particularly served the purchasing of the yacht through Tiger Marine Corp. Ltd.), as explained in paragraph 4 of the plaintiff's first affidavit, and evidenced by exhibit "PR-1" annexed thereto.
> 7. The yacht thus ordered had a considerable value and the company Maxstyle Ltd., by hand of the President Rudolph Pfaff, acknowledged the receipt from the plaintiff's debtor (Tiziana Ltd., Turismo Motor Yacht, Philippe Moret) of a payment of US$600,000.
> 8. The said debtor represented that this was so, and subsequently made available various documents which are exhibited in the bundle "PR-3" annexed to the plaintiff's first affidavit, which indicate that the order for the yacht was placed with Aquarius Yachts (France) and/or Maxstyle Ltd. (Taiwan) or Rudolph

Pfaff and that the yacht apparently had a value of US$784,098, as evidenced by Maxstyle's invoice dated 27 February 1992 contained in the said bundle "PR-3".

9. Rudolph Pfaff, whom the plaintiff believe controlled Maxstyle at the material time, also appears to have close links with Tiger Marine Corporation and the defendant, evidenced by

   (a) his purported issue of the undertaking on behalf of Tiger Marine and the defendant to impound the yacht and not to hand over the same, etc. (Exhibit "PR-5" of the plaintiff's first affidavit).
   (b) his subsequent facsimile to the plaintiff's Swiss lawyer Maitre Richard that he would be "leaving Maxstyle and so Tiger and Fadara from 15 December 1992". A copy of this facsimile and translation of the relevant paragraph (which, being competent in both French and English, I attest is a true and correct translation) is exhibited and marked "UAP-1".

10. There is evidence of a conspiracy between Maxstyle, Tiger Marine Corporation Limited and the defendant, as the invoiced sum for the yacht by Maxstyle was US$784,098, whilst that allegedly invoiced by the defendant to Tiger Marine Corporation (as represented by the defendant to the plaintiff) was US$280,000 of which a balance apparently of US$170,000 would remain to be paid, and the instalment, as alleged by the defendant, would only reach US$110,000, although the "financial statement" dated 27 February [1992] (see PR-3) acknowledged a payment in favour of the purchaser of US$600,000.

11.1 The plaintiff cannot reconcile how there is such a major difference between what was invoiced by Maxstyle to the ultimate purchaser and what the defendant allegedly invoiced Tiger Marine; especially since all of them appear to be associated in some way, unless there was some kind of a conspiracy to defraud the ultimate purchaser and thus the plaintiff.

11.2 The plaintiff cannot either reconcile how there can be such a major difference between the payment by Philippe Moret/Tiziana Ltd./Turismo Motor Yacht (the ultimate purchaser) of US$600,000, as figured in Maxstyle's "financial statement" and the payment allegedly received by the defendant of US$110,000.

12. This possibility is further strengthened by the fact that the defendant appears not to have taken any action to recover the alleged outstanding amount of US$170,000.00 owing in respect to the construction of the yacht from Tiger Marine Corporation Limited, and neither does Tiger Marine Corp. Ltd. and/or Maxstyle and/or Aquarius Yachts and/or the ultimate purchaser seem to be particularly anxious to take steps to collect the yacht.

13. In the circumstances, I verily believe the defendant is not an "innocent third party" and there are serious questions to be tried.

As for the application for security for costs, he had affirmed the following on the same date:

4. I am further informed by my solicitor and verily believe that the following circumstances are material to the exercise of the court's discretion as to whether to order security or not:

   (a) that the plaintiff ranks as the largest insurance group in France, the second in Europe and is ranked eighth in the world; and so is unlikely not to be able to satisfy any order as to costs.
   (b) that the defendant has procrastinated for more than a year before belatedly applying for security for costs - it is thus also not applying for the same out of a genuine apprehension that its costs will not be paid; rather it is making the application merely to gain a tactical advantage; especially in respect of the exorbitant figure of RM250,000 being cited as probable costs!
   (c) that there is a real possibility the defendant is party to a conspiracy to defraud the plaintiff; as elaborated on in my second affidavit filed in these proceedings.
   (d) that the defendant has made no attempt to file a defence in these proceedings, notwithstanding the lapse of more than a year in having been served with the statement of claim, and a notice by the plaintiff to so serve the defence.

5. I also wish to repeat that the amount asked for as security is exorbitant, with no breakdown tendered to justify how such a figure is arrived at.

6. In all the circumstances, I am firmly of the view that the Court should not order security for costs in the sum applied for or at all.

The fact that the defendant took slightly more than a year to apply to set aside the injunction certainly is a factor against them. And to file a certificate of urgency for the said application is definitely making a mockery of the Court process. My view was that the chain of events were not actually in dispute, that there is a cause of action in the matter and that there are serious questions to be tried. Upon a balance of convenience, since the boat had been tendered as

security for the relevant loan and the dissolution of the injunction would ultimately mean the loss of this security, it was my finding that the injunction should continue. I had accordingly dismissed the defendant's application to set aside the writ of summons and statement of claim and alternatively to set aside the injunction with costs.

As for the application for security for costs, it has been a matter of practice from the authorities on this point that a plaintiff out of the jurisdiction should give security for costs and in the consequence, I had granted the order in terms of the defendant's application for this with costs in the cause. However, RM250,000 was to my mind excessive and I had instead fixed RM30,000, which I considered appropriate in the circumstances, to be deposited within three weeks of the said order.

UNITED MALAYAN BANKING CORP. BHD.

v.

CHONG BUN SUN @ CHANG BUN SUN & ANOTHER CASE

HIGH COURT, KUALA LUMPUR
DATO' DR. VISU SINNADURAI J.
[ORIGINATING SUMMONS
NO. 31-2646-87]
9 MAY 1994

LAND LAW: Foreclosure proceedings - Order for sale by public auction - Variation of order - Whether Court had power to vary or set aside order - Whether Court had power to order sale thereof by the chargee by way of private treaty - Whether Court functus officio after making order - National Land Code 1965 ss. 256, 257.

LAND LAW: Foreclosure proceedings - Right of chargor to sell charged property by private treaty - Whether right accrued exclusively to chargor - Whether chargor empowered to effectuate sale by private treaty subsequent to an order for sale by public auction - National Land Code s. 266.

LAND LAW: Foreclosure proceedings - Order for sale by public auction - Validity - Whether validity of order open to challenge by chargor after sale of charged property to innocent purchaser concluded.

PRACTICE & PROCEDURE: Foreclosure proceedings - Order for sale by public auction - Fresh action by chargor to revoke order - Whether chargor entitled to raise same issues as raised in the foreclosure proceedings - Whether chargor bound by res judicata and estoppel.

Pursuant to a successful foreclosure proceedings the chargee in this case obtained a Court order to sell the charged property by way of public auction under s. 257 National Land Code. The property was subsequently put up for sale as ordered but the exercise somehow failed to attract any bidder and the property remained unsold. The facts further showed that in one of the two cases before the Court, the charged property remained unsold despite revision of the reserved price and despite the chargee having conducted no less than six public auctions to try to effectuate the sale in that manner. Having thus failed to carry out the sale in terms of the Court order, the chargee applied to set aside the earlier order for sale and sought a new order that the charged property be sold by way of private treaty.